UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SOUTHCOAST HOSPITALS GROUP, INC., RESPONDENT, AND 1199SEIU UNITED HEALTHCARE WORKERS EAST, CHARGING PARTY.	)	CASE NO. 01-CA-067303

RESPONDENT'S POSITION STATEMENT ON REMAND

This case arises out of Southcoast Hospitals Group, Inc.'s ("Southcoast") creation and implementation of HR 4.06, a hiring/transfer policy gives preference to unrepresented employees over represented employees at Southcoast's non-union facilities, if and only if represented employees enjoy a similar preference at Southcoast's union facilities. The U.S. Court of Appeals for the First Circuit (the "First Circuit") found that Southcoast predicated HR 4.06 on a legitimate and substantial business justification of leveling the playing field for union and non-union employees seeking transfer into a new position. Because counsel for the General Counsel has never claimed – or presented any evidence – that HR 4.06 was motivated by antiunion animus or was inherently destructive of employee rights, the Board should conclude that Southcoast's maintenance of HR 4.06 does not violate the Act, and should overturn the ALJ's conclusion to the contrary. Additionally, the Board should overturn the ALJ's subsidiary conclusion that Southcoast unlawfully refused to consider and/or hire various employees based on HR 4.06.

I. FACTS

A. Southcoast Hospitals Group

In June 1996, Charlton Memorial Hospital in Fall River, MA, St. Luke's Hospital in New Bedford, MA, and Tobey Hospital in Wareham, MA, merged to create Southcoast Hospitals Group. (Tr. 145-46). Now, Southcoast is a community based health delivery system with multiple access points, including the three principal hospitals.

Of the three hospitals that comprise Southcoast, only Tobey Hospital employees are represented by a union. Tobey Hospital has three distinct bargaining units represented by two unions. 1199 SEIU, United Health Care Workers East (the "Union") represents the Hospital's technical/clerical/service/maintenance unit, which is the only bargaining unit at issue here. (Tr. 6-8; GC Exh. 6).

B. The Union Hiring Preference at Tobey Hospital

Long before the merger that created Southcoast, Tobey Hospital's technical, clerical, service, and maintenance employees formed the bargaining unit represented by the Union. Under the Union's CBA with Tobey Hospital, whenever a bargaining unit position opens and is posted, members of the Union receive hiring preference for the open position. (GC Exh. 6, Art. VIII, §8.2). Tobey Hospital is required under the CBA to consider only Union members during the first round at Tobey Hospital for all bargaining unit positions. (Tr. 62; 238). Tobey Hospital considers per diems, temporary employees, and employees from outside the bargaining unit, such as St. Luke's or Charlton employees, in the second round. (Tr. 238). External candidates receive consideration in the third round.

Said differently, the Hospital evaluates and interviews Union members for the open positions first. (Tr. 238). The CBA requires the Hospital to select the most "senior qualified" applicant. (GC Exh. 6, Art. VIII). Because for purposes of hiring, seniority is confined to

members of the bargaining unit; this means that employees from either Charlton or St. Luke's, regardless of their respective qualifications, cannot be hired at Tobey if there is a single minimally qualified Tobey applicant. (Tr. 62, 154; GC Exh. 6, Art. VIII). This is true even where the St. Luke's or Charlton employee is more qualified, and/or longer tenured than the minimally qualified Tobey applicant. (Tr. 62-63). Consequently, the CBA severely restricts the transfer opportunities for Charlton and St. Luke's employees looking to transfer to Tobey. (Tr. 63; 154).

C. Southcoast's Employment Selection Process

When Southcoast was created in 1996, the newly formed entity set about to "standardize policies and practices across the three hospitals." (Tr. 147). During the parties' 1997-98 negotiations with the Union, the Hospital proposed language that would treat all internal Union and non-union job applicants the same throughout Southcoast. (Tr. 156). Specifically, the Hospital presented a "mobility" proposal that:

> [w]ould give Tobey workers the same type of preference for positions at [St. Luke's] and [Charlton] that [St. Luke's] employees now have for jobs at [Charlton], and that [Charlton] employees now have for jobs at [St. Luke's].

(R Exh. 1). The Union rejected that proposal. (Tr. 157-58).

On or about April 5, 1999, Southcoast promulgated HR 4.06, which codified already existing hiring practices. (GC Exh. 2). Consistent with Southcoast's effort to create uniformity across its three member hospitals, HR 4.06 provides that:

> [u]pon application, regular status employees who are beyond the introductionary [sic] period will be given first consideration for job postings providing the regular status employee's qualifications substantially equal the qualifications of external candidates. Employees in a union will be considered internal candidates if the collective bargaining contract provides reciprocal opportunity to employees who are not members of the union for open positions at

> the unionized site. Temporary and per diem status employees will be considered prior to external applicants . . . .

(GC Exh. 2).

Although HR 4.06 indicates that "[e]mployees in a union whose collective bargaining contract does not provide reciprocal opportunity to employees who are not members of the union, will be considered external candidates," in practice, employees in such a union are considered in the second round of the hiring process – before external applicants. (Tr. 150, 182; GC Exh. 2). Thus, Union applicants receive a hiring preference over applicants "off the street." (GC Exh. 2). Southcoast does not apply HR 4.06 to Union applicants applying for a St. Luke's or Charlton position that is not available at Tobey. Consequently, HR 4.06 does not limit employees' career choices. (Tr. 7).

In sum, HR 4.06 allows union-represented employees to enjoy the same hiring preferences as unrepresented employees, or a union can bargain away that preference, for greater preferential treatment for bargaining unit employees seeking positions within the unit. That is exactly what the Union did here. As the ALJ repeatedly noted, the hiring preference embodied in HR 4.06 is less restrictive than the Tobey Hospital hiring preference contained in the Union's CBA. At Tobey Hospital, the CBA requires that hiring managers select a Union applicant if there is a minimally qualified union applicant. (Tr. 61-62; GC Exhs. 5, 6). Said differently, Tobey Hospital hiring managers do not even consider St. Luke's or Charlton applicants if there is a minimally qualified Union applicant. By contrast, under HR 4.06, union affiliation does not dictate hiring decisions at St. Luke's or Charlton. In those hospitals, hiring managers base their decisions on "necessary knowledge and skills, related experience and education, and the relevant personal characteristics demonstrated during the interview process and prior employment." (GC Exh. 2). Furthermore, the hiring manager can reject qualified first-round applicants from St.

Luke's or Charlton, and consider second round Union-represented Tobey applicants, if he or she wants to do so. (Tr. 223). It is, therefore, substantially easier for a Union applicant to receive a position at St. Luke's and Charlton than it is for a non-union applicant to transfer to Tobey.

As David DeJesus, Southcoast's Senior Vice President of Human Resources explained, Southcoast created HR 4.06 as "a matter of equity." (Tr. 151). According to Mr. DeJesus, "if a position is posted at the Tobey site and represented by either of the unions, then people at St. Luke's or Charlton would not be considered in the first round at Tobey . . . [Southcoast's] view is that it should work the same way in the other direction." (Tr. 151). The impetus for HR 4.06 was not union animus, but equity [?equality] for all employees, regardless of union affiliation.

D. The Impact of HR 4.06 on Union Applicants

To gather evidence to support its claim that HR 4.06 violated the Act, the Union searched high and low for evidence of any employee adversely affected by HR 4.06. (Tr. 49-50; GC Exh. 7). Specifically, Lisa Lemieux, a union delegate, emailed every member of the bargaining unit for whom she had an email address, "asking if anybody had ever applied for a job outside of Tobey within Southcoast and been denied." (Tr. 51). The Union's extensive search for adversely affected employees turned up just two employees allegedly affected by HR 4.06: Christopher Souza and Noelia Nunes.

Mr. Souza, an HVAC Preventive Maintenance Mechanic employed by Southcoast at its Tobey Hospital site and Union delegate applied for Building Superintendent position at St. Luke's posted on or about May 16, 2011. (Tr. 19; GC Exh. 3). During the hearing on this matter, Mr. Souza admitted that his application did not reflect that he met the basic requirements of the position. (Tr. 37). Because his application did not reflect the requirements for the position, he was – by the express language on the application itself – ineligible for consideration

for the position. (GC Exh. 3).

Ms. Nunes, a Certified Nursing Assistant (CNA) employed by Southcoast at its Tobey Hospital site and Union member, applied for six positions at St. Luke's between July and December 2011. Of these, just three remain at issue:[1]

1. CNA-I (posted 7/5/2011)

On July 5, 2011, Southcoast posted a vacant day shift CNA-I position in the Intensive Care Unit ("ICU") at the St. Luke's facility. (Tr. 188-90; GC Exh. 9). Ms. Nunes applied on the same day. (Tr. 121-22; GC Exh. 9). Ms. Nunes admits that at the time of her application, she lacked the acute care experience required by the position. (Tr. 123-27; GC Exh, 9). By the express language of the application, she was ineligible for consideration for the CNA-I position. According to Ms. Nunes, two weeks after she applied for the position, she received an email explaining that, consistent with the Policy, as a member of a Tobey Hospital bargaining unit, Southcoast would consider Ms. Nunes' application during the second round. (Tr. 66).

Approximately one day later, on July 20, 2011, Southcoast hired Christine Cabral for that position. (Tr. 190). At the time of her hire, Ms. Cabral already worked in a Nursing Assistant I position in the ICU at the St. Luke's facility, except on the night shift. She had been in that position for six years. (Tr. 190-91). As such, Ms. Cabral had greater seniority and more relevant experience than Ms. Nunes. (GC Exh. 9).

2. ORA-I (posted 10/17/2011, reposted 12/22/2011)

On October 17, 2011, Southcoast posted a vacant full-time ORA-I position at the St. Luke's facility. (Tr. 197; GC Exh. 12). Southcoast did not fill the position during the initial posting period, and reposted it as a 32-hour position on December 22, 2011. (Tr. 197; GC

[1] The ALJ concluded that Southcoast did not unlawfully fail to consider Ms. Nunes for a CNA-II position posted on August 9, 2011, and the Board previously rejected the ALJ's finding that the Respondent violated Section 8(a)(3) and (1) by refusing to hire Ms. Nunes to the ORA-I position posted on October 26, 2011. *See* 363 NLRB No. 9

Exh. 12).

The ORA-I position required that a successful applicant have "phlebotomy and EKG skills." (Tr. 197; GC Exh. 12). Ms. Nunes testified, however, that she did not have the requisite phlebotomy skills. (Tr. 94). Her application reflected this lack of prerequisites. (GC Exh. 12). Again, by the plain terms of the application, this precluded Ms. Nunes from consideration.[2] Regardless, it is undisputed that Ms. Nunes was ultimately considered for the ORA-I position and rejected as unqualified by the hiring manager. (Tr. 198-99; R. Exh. 5). The ALJ found as much. (ALJ Decision 9:26-28).

3. ORA-II (posted 10/26/2011)

On October 26, 2011, Southcoast posted a vacant full-time ORA-II position at the St. Luke's facility. (Tr. 204; GC Exh. 13). The ORA-II position is a higher level position than the ORA-I position for which Ms. Nunes was not qualified, and required "[k]nowledge of Medical Terminology [sic] as related to the perioperative setting," and "[a] minimum of one (1) year related work experience." (Tr. 204; GC Exh. 13). The ALJ found as much. (ALJ Decision 9:39-40).

Ms. Nunes applied for the position on October 27, 2011. (GC Exh. 13). At the hearing, Ms. Nunes admitted that she lacked the medical knowledge, but claimed she could pick it up "in like two days." (Tr. 97). Ms. Nunes' opinion of her qualifications was dramatically different from Southcoast's, however. As Ms. Medeiros testified, Southcoast may consider applicants who lack a "preferred" skill, but candidates that lack a required skill are unqualified. (Tr. 233).

[2] Relying on inapposite and anecdotal statements by a single non-managerial employee, Ms. Nunes testified that she did not believe her lack of this required skill was a problem. (Tr. 94-95). As Ms. Nunes explained, her friend, Mary Guillotte, was a mobility aide who applied for a CNA-II position in the Emergency Department ("ED") even though "she did not have the CNA requirement," for the position, and Southcoast taught her the requisite skills on-the-job. (Tr. 94-95; 116-117). The ALJ erroneously credited this testimony. Notably, a CNA-II position in the ED does not require a CNA certification. According to General Counsel's Exhibit 10, a Nursing Assistant II position in the ED preferred, not required, a "Certified Nursing Assistant, Medical Assistant, EMT or Paramedics certification[]." (GC Exh. 10). That Southcoast allegedly hired Ms. Guillotte without such a certification, therefore, is immaterial.

Ms. Medieros' testimony is supported by the plain language of Southcoast's application. Because Ms. Nunes' lacked the required training in "medical terminology" for the ORA-II position, she would need to pass a training course before she was eligible for the position. (Tr. 233).

More fundamentally, however, Ms. Nunes admitted that she never previously worked in an OR. She also lacked the required "related work experience" required for the position. (Tr. 132). Matthew Souza, the employee hired into the position, did not lack the requisite knowledge or experience. Mr. Souza was an 18-year veteran of St. Luke's OR. (Tr. 204-05; GC Exh. 13).

4. Mobility Aide Position (posted 12/9/2011)

On or about December 9, 2011, Southcoast posted a Mobility Aide position at the St. Luke's facility. (GC Exh. 14). This was the same position previously occupied by Ms. Parent. (GC Exh. 14). However, because in September 2011, Southcoast converted the position from a temporary position to a permanent one, this vacancy was open to all Southcoast employees.

Ms. Nunes applied for this position on December 12, 2011. (GC Exh. 14). In January 2012, Ms. Nunes interviewed for the position and, later that month, Southcoast offered her the position. (Tr. 100-01). Ms. Nunes accepted the position in late January, but did not start working in that position until March because, at the request of her then-Manager at Tobey Hospital, Ms. Nunes voluntarily agreed to delay her transfer into the Mobility Aide position until Southcoast found a replacement for her at Tobey. (Tr. 101). The Acting General Counsel presented no evidence that if Southcoast interviewed Ms. Nunes earlier that her transfer would have occurred sooner. Because Ms. Nunes agreed to stay in her CNA position until Southcoast found a replacement, and did so, the date of her transfer into her new position would not have

changed because of earlier consideration.

Despite the Union's and counsel for the General Counsel's allegations, the record evidence revealed that Mr. Souza and Ms. Nunes were not considered – or were considered and not hired – for reasons entirely unrelated to the operation of HR 4.06, or their status as members of the Union. (*See* Respondent's Brief in Support of its Exceptions to the ALJ's Decision, pp. 32-40). St. Luke's ultimately hired Ms. Nunes, putting the lie to any claim that HR 4.06 operates to exclude Union members. On top of that uncontroverted fact, Southcoast produced additional evidence of fourteen other Union applicants hired at either St. Luke's or Charlton. (R. Exhs. 6(a), 6(b), 7).

E. The ALJ and Board Proceedings

The General Counsel's Amended Complaint alleged that HR 4.06 violated Section 8(a)(1) and (3) because it "prohibits union-represented employees at . . . Tobey Hospital from receiving consideration from employment at its unrepresented facilities until the second round of interviews." Amended Compl. ¶ 8. The Amended Complaint further alleged that Southcoast violated Section 8(a)(1) and (3) by refusing, under HR 4.06, to consider Tobey Hospital employees Noelia Nunes and Christopher Souza as transfer applicants for positions at its unrepresented facilities and failing to hire, or delaying the hire, of Ms. Nunes. *Id.*, ¶ 10.

At the hearing, counsel for the General Counsel clarified the Amended Complaint's allegations. Specifically, she explained that she did not contend that HR 4.06 created a closed hiring system that precluded the hiring of Union applicants. (Tr. 33). Instead, counsel for the General Counsel contends that each of these alleged acts "discriminates against employees on the basis of rights guaranteed by Section 7 of the Act and has at least a comparatively slight impact on such Section 7 rights under *NLRB V. [sic] Great Dane Trailers*, 388 U.S. 26 (1967)." *Id.*, ¶ 12. At no time did counsel for the General Counsel allege or argue that Southcoast acted

with antiunion animus, and counsel for the General Counsel conceded that HR 4.06 was not inherently destructive of employee rights because it "did not completely preclude the hire of Tobey employees into non-unit positions." GC Brief to the ALJ, n. 11. Counsel for the Acting General Counsel argued exclusively that Southcoast failed to produce a legitimate and substantial business justification for HR 4.06.

In erroneously concluding that Southcoast violated Sections 8(a)(1) and (3) of the Act by maintaining HR 4.06, the ALJ relied on counsel for the General Counsel's flawed analysis and declined to find whether HR 4.06 was motivated by antiunion animus. Based solely on his incorrect conclusion that HR 4.06 violated the Act, the ALJ further found that Southcoast violated Sections 8(a)(1) and (3) of the Act (1) by failing to hire Ms. Nunes for an Operating Room Assistant-I ("ORA-I") position, (2) by refusing to consider and delaying the hiring of Ms. Nunes for a Mobility Aide position, and (3) by refusing to consider Mr. Souza for the Building Superintendent position, Ms. Nunes for the Mobility Aide and Certified Nursing Assistant-I ("CNA-I") positions, and other unidentified similarly situated Tobey employees for various unidentified positions.

In its Exceptions to the ALJ's findings, Southcoast argued, as it had before the ALJ, that Counsel for the Acting General Counsel failed to establish antiunion motivation for HR 4.06. Counsel for the General Counsel did not refute that argument, contending, "there is no need for Counsel for the Acting General Counsel to produce direct evidence of antiunion animus." General Counsel's Answering Brief to Exceptions, p. 19.

The Board majority affirmed the ALJ's conclusion that Southcoast failed to produce a legitimate and substantial business justification for HR 4.06 and "found it unnecessary to decide whether HR 4.06 was motivated by antiunion considerations." Southcoast, 363 NLRB No. 9,

fn. 7. Based on that finding, the Board affirmed the ALJ's findings above. However, in dissent, then-Member, now Chairperson, Miscimarra disagreed with the majority, explaining that, in his view, Southcoast had adduced a legitimate and substantial business justification for HR 4.06 and there was "no evidence of an antiunion motivation." 363 NLRB No. 9. Consequently, Chairperson Miscimarra concluded that Southcoast had not violated the Act.

F. The First Circuit's Decision

The First Circuit agreed with Chairperson Miscimarra, holding that the Majority's conclusion that Southcoast failed to produce a legitimate and substantial business justification for HR 4.06 lacked substantial evidence. In reaching its conclusion, the First Circuit explained that "nothing in the record supports the conclusion that nonunion workers are given greater or more opportunities than union workers." Slip op. at 19. According to the Court:

> Southcoast adopted HR 4.06 in an effort to treat its union and nonunion workers more even-handedly when filling vacant positions. HR 4.06 achieves this goal by treating nonunion employees more like union members than they otherwise would be treated. Because Southcoast's chosen method was reasonably adapted to achieve its stated goal, the Board lacked the power to reject HR 4.06 simply because it is not identical to the union hiring policy or because Southcoast might have achieved its goal through alternative means that were more beneficial to its union employees.

Id. at 20.

II. ARGUMENT

The Board predicated its finding that HR 4.06 violates Sections 8(a)(1) and 8(a)(3) of the Act by unlawfully discriminating against Tobey Hospital employees, on its erroneous conclusion that Southcoast "failed to establish a business justification defense. The First Circuit expressly rejected that conclusion. Consequently, under *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), counsel for the General Counsel must prove that Southcoast acted with antiunion animus or that HR 4.06 is inherently destructive of employee rights. Before the ALJ, counsel for the

General Counsel conceded that HR 4.06 was not inherently destructive of employee rights because it "did not completely preclude the hire of Tobey employees into non-unit positions," GC Brief to the ALJ, n. 11, and at no time did counsel for the General Counsel claim, or present evidence, that antiunion animus motivated Southcoast's maintenance of HR 4.06. There is no basis for the Board to conclude that HR 4.06 violated the Act in anyway. Because the ALJ and the Board both predicated their erroneous conclusions that Southcoast unlawfully failed to consider and/or hire various employees on the premise that HR 4.06 violated the Act, there is no basis for upholding those subsidiary findings.

On remand, the Board should reverse and vacate the ALJ's Decision and Order and Dismiss the Amended Complaint.

A. The Board Should Conclude that the ALJ Erred by Concluding that HR 4.06 Violates Sections 8(a)(1) and (3) of the Act

As the Board held in its original decision, this case is properly analyzed under *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). In *Great Dane*, the Supreme Court expressed the following principles to determine whether conduct that facially discriminates against employees who exercise their Section 7 rights violates the Act:

> First, if it can be reasonably concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminate conduct on employee rights is "comparatively slight" in antiunion motivation must be proved to sustain the charge if the employee has come forward with evidence of legitimate and substantial business justifications for the conduct.

Gen. Die Casters, Inc., 2012 NLRB LEXIS 701, at *175-76 (N.L.R.B. Sept. 28, 2012). When "the resulting harm to employee rights is . . . comparatively slight, and a substantial and legitimate business end is served, the employers' conduct is prima facie lawful," and the Acting

General Counsel must make an affirmative showing of improper motivation. *Great Dane*, 388 U.S. at 34. Under *Great Dane*, if the employer adduces a substantial and legitimate business justification, the burden shifts to the General Counsel to prove that the conduct at issue is "inherently destructive" of important employee rights or motivated by antiunion animus. *Id.* at 33; *see Hawaiian Telecom, Inc.*, 365 NLRB No. 36 (2017).

1. The ALJ Erred By Concluding that Southcoast Failed to Establish a Legitimate and Substantial Business Interest for the Policy

Here, the General Counsel conceded, the ALJ found, and the Board agreed that HR 4.06 is not inherently destructive of important employee rights. (ALJ Decision 12:43-14:8; 363 NLRB No. 9). Moreover, the First Circuit unequivocally found that Southcoast presented a legitimate and substantial business justification for HR 4.06 – namely, that HR 4.06 "helps level the playing field between union and nonunion workers." Thus, to establish that HR 4.06 violated Section 8(a)(1) and (3), counsel for the General Counsel must establish that antiunion animus motivated Southcoast's maintenance of HR 4.06.

2. There is No Evidence of Anti-Union Animus

Because Southcoast produced a substantial and legitimate business justification for the Policy, the acting General Counsel was required to establish that antiunion animus motivated the Policy. *Great Dane*, 388 U.S. at 33. The ALJ found no such animus. (ALJ Decision 20:25-33). As Chairperson Miscimarra explained in his dissent in the Board's prior decision, "the General Counsel litigated this case exclusively on the theory that no such justification exist[ed], and there is no evidence of antiunion motivation." 367 NLRB No. 9 (Miscimarra, dissenting).

At no time before the ALJ or the Board, did counsel for the General Counsel even allege or even argue that antiunion animus motivated the maintenance of HR 4.06. Not only does the Amended Complaint not allege that antiunion animus drove HR 4.06, but counsel for the General

Counsel also presented no evidence of antiunion animus and never argued that such animus existed. Nowhere in their briefs to both the ALJ, the Board, or the First Circuit did counsel for the General Counsel point to any evidence of antiunion animus or otherwise contend that HR 4.06 was the product of such animus. In its Opinion vacating the Board's Decision and Order, the First Circuit noted that "the Board does not seek to defend its decision by arguing that HR 4.06 was the product of antiunion motivation." Counsel for the General Counsel had myriad opportunities before the ALJ, the Board, and the First Circuit, to produce evidence of antiunion motivation. That counsel for the General Counsel repeatedly failed to even allege or argue that such motivation existed precludes such a novel assertion at this late stage.

The only evidence of motive adduced by any party as to the impetus for HR 4.06 was the testimony of Mr. DeJesus, who created and implemented HR 4.06. (Tr. 147). Mr. DeJesus testified – without challenge or contradiction – that the sole impetus for the Policy was creating equity for all employees regardless of their union membership or support. (Tr. 147-49; 151). Contrary to any assertion that antiunion animus motivated Mr. DeJesus, the First Circuit found no evidence that HR 4.06 disadvantaged union employees in any way. Slip op. 14-19.

There is no evidence of union animus. The ALJ should have dismissed every allegation challenging HR 4.06. Consequently, the Board should sustain Southcoast's exceptions and dismiss the Complaint.

3. HR 4.06 is not Inherently Destructive of Important Employee Rights

Just as counsel for the General Counsel has never asserted that antiunion animus motivated HR 4.06, he has similarly never alleged or argued that the policy is inherently destructive of important employee rights. As noted above, counsel for the General Counsel expressly conceded that HR 4.06 was not inherently destructive of employees' rights. Counsel for the General Counsel cannot advance that new theory now.

Moreover, such a theory contradicts the First Circuit's Opinion. "Inherently destructive conduct has been described as action which has 'far reaching effects which would hinder future bargaining, or . . . discriminates solely upon the basis of participation in strikes or union activity . . . .'" *Hawaiian Telecom, Inc.*, 365 NLRB No. 36 (2017) (citations omitted; alteration in original). As the Court explained, here:

> It is also troubling that the Board concluded that HR 4.06 tipped the playing field too far in favor of nonunion workers without attempting to determine how its judgment might be affected by other aspects of the hiring policies that leave union members at a comparative advantage. For example, HR 4.06 entitles Southcoast to select the best-qualified candidate for a vacant nonunion position, even though qualified nonunion employees have also applied for the position. In contrast, Southcoast is required under the union hiring preference to hire the most senior, qualified union applicant for a vacant union position even if more qualified nonunion applicants have applied. Southcoast also grants union members preferential consideration over nonemployee applicants when filling nonunion jobs, whereas the record contains limited, if any, evidence that Southcoast affords nonunion employees a similar preference when filing union positions. In addition, HR 4.06 gives the union the right to have its members treated as regular-status Internal Applicants by agreeing to surrender its hiring preference for union positions.

Slip op. at 17-18. The Court further noted that "[t]he fact that the union did not so elect may well suggest that it sees the current playing field as still slightly tipped in its direction." *Id.* at n. 5. These findings directly contradict any contention that HR 4.06 is inherently destructive of important employee rights.

Implicit in the Court's holding is that application of HR 4.06 does not depend on and, therefore, does not discourage union membership. Quite the opposite, HR 4.06 entitles union-represented employees to the same Southcoast-wide hiring preference as unrepresented employees. The only way that union-represented employees lose that preference is by negotiating a greater hiring preference (*i.e.*, a preference over non-union applicants) for

bargaining unit positions. In other words, HR 4.06 serves as the floor from which unions may choose to either, (i) enjoy a system-wide hiring preference equivalent to that of non-union employees, or (ii) bargain for a greater hiring preference for bargaining unit jobs solely for the benefit of its membership. This is far from the "Hobson's choice" painted by the Acting General Counsel. Rather, as the First Circuit alluded, it is a question of which hiring preference the Union values more. Here, the Union affirmatively chose the latter course. In finding a violation, the ALJ erroneously gave Union members the same preference as non-union employees at Charlton and St. Luke's, even though the Union bargained away that preference to keep non-union employees closed out of Union jobs. As Chairperson Miscimarra explained in his dissent, "[e]ven under HR 4.06, unit employees at Tobey still receive more favorable treatment than do nonunit [non union?] employees at Charlton and St. Luke's." 367 NLRB No. 9 (Miscimarra, dissenting). If union-represented employees continue to receive more favorable treatment under HR 4.06, it simply cannot be inherently destructive of employees' Section 7 rights.

Nothing about HR 4.06 discourages Union membership. The Policy applies to employees at Tobey Hospital in bargaining unit positions regardless of whether they are members of the Union. The only employees affected by the Policy are those actively seeking to transfer **out** of the bargaining unit. The CBA's lawful, negotiated hiring preference for bargaining unit employees precludes non-unit personnel from transferring into union jobs, and is far more effective at discouraging union membership.

B. The Board Should Conclude that the ALJ Erred in Finding that Southcoast Violated Sections 8(a)(1) and (3) of the Act by Failing to Consider and or Hire Various Applicants for Various Positions, and Delaying the Hiring of Ms. Nunes into the Mobility Aide Position

In its Decision and Order, the Board held that

> for the reasons stated by the judge, we affirm his findings that Respondent violated Section 8(a)(3) and (1) by refusing, based on HR 4.06, to consider unit employees Christopher Souza for the position of building superintendent and Noelia Nunes for the positions of CNA-I, ORA-I, ORA-II, and Mobility Aide; delaying the hire of Nunes to the position of Mobility Aide, also based on HR 4.06; and refusing, on the same basis, to consider and/or hire other similarly situated employee-applicants known to the Respondent but not identified during the hearing.

367 NLRB No. 9 (emphasis added). In each case, the Board predicated its decision to uphold the ALJ's findings on the erroneous conclusion HR 4.06 violated the Act. Because, as detailed above, HR 4.06 does not, in fact, violate the Act, the Board should reverse the ALJ's subsidiary conclusion that Southcoast violated the Act by failing to consider and/or hire Mr. Souza, Ms. Nunes, and various other employees, and delaying the hiring of Ms. Nunes.

Under FES, 331 NLRB 9 (2000), to establish discriminatory refusal to consider for hire, counsel for the General Counsel must prove (1) that Southcoast excluded Mr. Souza, Ms. Nunes, and others from the hiring process, and (2) that antiunion animus contributed to the decision not to consider the applicants. *FES*, 331 NLRB at 15. As noted above, counsel for the General Counsel has refused to assert, or produce evidence of antiunion animus. More to the salient point, however, an employer's neutral application of a lawful preferential hiring policy, such as Southcoast's application of HR 4.06, is an absolute defense to refusal-to-consider/hire allegations. *See, e.g., Brandt Construction Co.*, 336 NLRB 733, 733-734 (2001), review denied sub nom. *Operating Engineers Local 150 v. NLRB*, 325 F.3d 818 (7th Cir. 2003); *Nat'l Sec. Techs., LLC*, 356 NLRB No. 183 (June 21, 2011) (dismissing failure to consider allegations

where there was no evidence of antiunion animus).

Even absent this absolute defense, the record evidence establishes that Southcoast did not violate the Act.

1. Southcoast did not Unlawfully Fail to Consider Either Mr. Souza or Ms. Nunes for Various Positions at the Hospital

Further, Southcoast can avoid liability by establishing that it would not have considered Mr. Souza and Ms. Nunes even absent their union activity or affiliation. *Tambe Elec.*, 346 NLRB 380, 381 (2006) (rejecting failure to consider allegations where applicants did not meet employer's hiring criteria). Mr. Souza's or Ms. Nunes' union activity and/or affiliation played no part in Southcoast's decision not to interview them for the respective positions.

a. *Christopher Souza*

Mr. Souza's application failed to establish that he met the basic requirements of the May 2011 Building Superintendent position. (GC Exh. 3). He admitted as much, (Tr. 37-38), and the ALJ acknowledged Mr. Souza's incomplete application. (ALJ Decision, fn. 16). He was ineligible for consideration. (GC Exh. 2). There was no evidence that Southcoast considered any employee whose application did not match the posted qualifications for the position. This is because they did not. (Tr. 182, 227; GC Exh. 2). Clearly, Southcoast would not have interviewed Mr. Souza regardless of HR 4.06 or his union affiliation.

b. *Noelia Nunes*

(1) *CNA-I*

There is no evidence that Southcoast failed to consider Ms. Nunes for the CNA-1 position because of her union affiliation. Ms. Nunes admits that at the time of her application she lacked critical care experience, which is the very essence of a position in the ICU. (Tr. 123-27; GC Exh, 9). She would not have been considered for the position, particularly when there

was a candidate, such as Christine Cabral who already worked in the position – and met all of the position's requirements – but on a different shift. (GC Exh., 9). Ms. Cabral had more relevant experience and was a known quantity to the hiring manager. Ms. Cabral also had greater seniority and more relevant experience than Ms. Nunes. (Ibid.).

(2) *ORA-I*

Similarly, Ms. Nunes admitted that at the time of her application for the ORA-I position, she lacked the requisite "phlebotomy . . . skills." (Tr. 94, 128, 197; GC Exh. 12). As the ALJ found, Southcoast ultimately reviewed her application and rejected her as unqualified. (Tr. 198-99, 235; R. Exh. 5). ALJ Decision 9:26-28. That Southcoast ultimately considered Ms. Nunes for the position, and disqualified her, reveals that her own lack of required skills and not HR 4.06 or antiunion animus, barred her employment.

The ALJ made much of the fact that the Southcoast offered the ORA-I position to Patrick Mentzer on November 29, 2011, who was in training for phlebotomy certification and not due to complete that training until February 2012. (Tr. 217-18, 229; GC Exh. 12). The ALJ ignored critical evidence. The ORA-I position required phlebotomy "skills" not a phlebotomy certification. Mr. Mentzer clearly had those skills. At the time of his application, Southcoast already employed Mr. Mentzer as an ORA-I on a different shift at St. Luke's. He therefore possessed all of the requisite skills. (Tr. 228).

After Mr. Mentzer declined the position, Southcoast offered the position to external applicant Erika Dulude. The ALJ's finding that Ms. Dulude's application did not evidence any phlebotomy skills is patently incorrect. Ms. Dulude's application reflects EKG skills and "capillary puncture" and "venipuncture" skill, which are phlebotomy skills. Because Southcoast does not consider external applicants until after second round applicants such as Ms. Nunes, the consideration of Ms. Dulude means that Ms. Almeida already considered Ms. Nunes and deemed

her unqualified.

Finally, when attempting to fill the ORA-I position, Southcoast reviewed the application of Vanessa Fernandes, another Tobey Hospital employee and Union bargaining unit member. (GC Exh. 12). Unlike Ms. Nunes, Ms. Fernandes had the phlebotomy and EKG skills sought in the posting. (GC Exh. 12). However, Ms. Fernandes was ineligible for transfer because she had been a Tobey Hospital employee for less than six months. (GC Exh. 12). That Southcoast considered another Tobey employee for this position directly contradicts any contention that union animus played any role in the decision not to hire Ms. Nunes.

(3) *ORA- II (posted 10/26/2011)*

The ALJ also erred by finding that Southcoast unlawfully failed to consider Ms. Nunes for the October 2011, ORA-II position in St. Luke's ICU. As discussed above, Ms. Nunes, who was unqualified for the lower-level ORA-I position, admittedly lacked the skills and experience required for this position. (Tr. 132, 204; GC Exh. 13). Southcoast would not have considered her for the position regardless of whether her application was part of the first or second round. Her union affiliation, therefore, played no part in Southcoast's decision.

2. Southcoast did not Unlawfully Delay the Hiring of Ms. Nunes into the Mobility Aide Position

The Board analyzes allegations of an unlawful delay in hiring under the same burden-shifting rubric as an unlawful failure to hire. *Tradesmen Int'l*, 351 NLRB 579, 583 (2007). Typically, examination of an allegation of dilatory hiring requires examination of whether an employer dragged its feet in offering an employee employment and whether antiunion animus prompted that delay. *Savoy Brass Mfg. Co.*, 241 NLRB 51, 51 fn. 2 (1979).

Southcoast posted the Mobility Aide position on December 9, 2011. The hiring manager reviewed candidates beginning on December 15, 2011 and extending into early January 2012.

Southcoast interviewed Ms. Nunes for the position in January 2012 and awarded her the position that same month. (Tr. 100-01). This is not an atypical delay between the posting and the hiring, and the Acting General Counsel offered no evidence to the contrary. For example, Southcoast posted the Building Supervisor position for which Mr. Souza applied on May 16, 2011 and did not fill it until June 21, 2011, and that window did not include the intercession of two major holidays. (GC Exh. 3) The same is true of the CNA-II position that Southcoast posted on August 9, 2011 and did not fill until September 23, 2011. (GC Exh. 10). In both of those instances, Southcoast selected first-round non-union applicants. There is no evidence of any delay, much less one motivated by antiunion animus.

Further contradicting the ALJ's finding of an unlawful delay in transferring Ms. Nunes to the Mobility Aide position is that Ms. Nunes testified that she agreed to delay her transfer until March 2012, while Tobey Hospital searched for her replacement. (Tr. 101-02, 136). As the ALJ correctly found, such a delay is consistent with Southcoast's Policy. (GC Exh. 2). There is no evidence that Southcoast would have transferred Ms. Nunes sooner if it interviewed her on January 6 rather than mid-January. (ALJ Decision, fn. 20). ALJ's finding of a delay in hiring allegation is untenable and the Board should sustain Southcoast's exceptions.

III. CONCLUSION

On remand from the First Circuit, and consistent with the Court's holding, the Board should conclude that Southcoast did not violate the Act by maintaining and relying upon HR 4.06. The record evidence does not support a finding that Southcoast acted with an antiunion motive or that HR 4.06 was inherently destructive of important employee rights. Similarly, the Board should reject the ALJ's conclusion, predicated on HR 4.06, that Southcoast violated the Act by failing to consider and/or hire Mr. Souza, Ms. Nunes, and/or various other Southcoast employees. Consistent with those conclusions, the Board should vacate the ALJ's Decision and Order and dismiss the Amended Complaint in its entirety.

Respectfully submitted,

/s/ Anthony D. Rizzotti

Anthony D. Rizzotti
Gregory A. Brown
LITTLER MENDELSON, P.C.
One International Place
Suite 2700
Boston, MA 02110
617.378.6000
arizotti@littler.com
gbrown@littler.com

Attorneys for Respondent

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically with the National Labor Relations Board's Office of the Executive Secretary and served by email, this 16th day of May, 2017, upon:

Betsy Ehrenberg, Esq.
Pyle Rome Eherenberg PC
18 Tremont Street, Suite 500
Boston, MA 02108-2301

John J. Walsh, Esq.

Elizabeth Gemperline

National Labor Relations Board
10 Causeway Street, Sixth Floor
Boston, MA 02222-1072

/s/ Gregory A. Brown
Gregory A. Brown

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